

**United States Department of Labor  
Board of Alien Labor Certification Appeals  
Washington, D.C.**

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Date: January 30, 1998

**Case No: 97 INA 208**

In the Matter of:

**ROMANELLO ELECTRIC CO.,**  
Employer

on behalf of

**KAMPTA P. SANICHAR,**  
Alien.

Appearances:

Before:           Huddleston, Lawson and Neusner  
                  Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of KAMPTA SANICHAR (Alien) filed by ROMANELLO ELECTRIC CO., (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

**Statutory authority.** An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File (AF), and written arguments of the parties. 20 CFR § 656.27(c).

determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. See 8 U.S.C. § 1182(a)(14)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. Such requirements include the responsibility of the employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.<sup>2</sup>

## STATEMENT OF THE CASE

**Application.** On May 25, 1993, the Employer applied for labor certification to enable the Alien, a national of Guyana, to fill the job of "Journeyman Electrician." AF 01-05.<sup>3</sup> The Employer described the job as follows:

To install light, heat and power in and on buildings in the City of New York according to the New York City electric codes. To trouble-shoot electrical problems in residential, commercial and industrial areas. To install electrical services, ie: end line boxes, electrical meter, main switches, distribution boxes, etc. Install and trouble-shoot emergency and exit lighting. Install and trouble-shoot electrical motors and starters. Service and install intercom and control wiring for other low voltage situations. Make reports when possible.

Employer offered a salary of \$405.00 per week based on a forty hour week from 9:00 AM to 5:00 PM, plus \$16.88 an hour for overtime work. No formal education was given, but Employer required five years of training as an Electrical Apprentice, plus two years of experience in the Job Offered. AF 42. Although eighty-nine people applied for the job after the Employer posted and advertised this position, none of the U. S. applicants were hired. AF 194.

**Notice of Findings.** The Certifying Officer (CO) issued a Notice of Findings (NOF) on April 19, 1996, advising the Employer that certification would be denied, subject to rebuttal. AF 195-207.

Citing 20 CFR § 656.21(b)(5), the CO noted the Employer's requirement of two years of experience in the job offered and observed that the Alien did not have "experience in trouble shooting electrical problems, installing and servicing intercoms, electrical services, and endline boxes in residential and commercial areas and ... in working with N.Y.C. electric codes."

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<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

<sup>3</sup>On September 20, 1993, Employer filed amended Forms ETA 750 Parts A and B, which were backdated to the original filing date. AF 14-52. For convenience, all references in this Decision will be to the more recent version, which is AF 39-42.

AF 55-60. Observing that the Alien's residential and commercial electrical work was performed at the Guyana Sugar Corporation, and concluded that he only performed the job duties of an Electrical Journeyman in an industrial setting. This led the CO to infer that the Employer was willing to accept such prior experience as qualifying, even though the Alien is not experienced in all of the job duties listed in the ETA 750 form. See Item #13. Employer was given the choice of submitting evidence that the Alien's experience was sufficient or reducing the requirements to the level of the Alien's expertise. AF 200-201.

The CO noted further that an electrician does not usually perform trouble shooting for electronic analog/digital equipment. While he may install the necessary electrical wiring for such equipment, electronic work is normally performed by an electronics engineer or an Electronics Technician. While noting that the application did not clearly indicate the nature of the electrical equipment involved, the NOF concluded that the Employer's requirement that the worker perform trouble shooting of electro-nic analog/digital equipment in residential, commercial and industrial building to be excessive and restrictive. AF 200.

The NOF then listed the names of forty-four job candidates of the eighty-nine applicants who responded to this offer. Thirty-three of the forty-four applicants were rejected because they had no experience in trouble shooting analog and digital electrical equipment. If those forty-four job applicants were rejected because they were not able to trouble shoot electronic digital and analog electronic equipment, the CO found that they were rejected for reasons that were neither lawful nor job related, since this specific job duty was not normal or customary for an Electrician to perform.

The NOF noted the names of sixteen qualified U. S. workers whom the Employer either failed to contact or whom the Employer interviewed by telephone and rejected. In each of the telephone interviews the Employer rejected the candidate because of a perceived failure to qualify by reason of their lack of experience in working with analog and digital electrical equipment. The CO required the Employer to rebut these findings by demonstrating that all forty-four U. S. workers were rejected for reasons that were lawful and job related. AF 195-196.

**Rebuttal.** On June 21, 1996, the Employer filed its rebuttal, which included a letter from the Employer, documentation as to the Alien's training and experience, and descriptions of the services provided by other electrical contracting companies. AF 212-251. The Employer contended that its experience and job requirements were both customary in the market where it competes and a business necessity. It said it rejected U. S. workers who applied for reasons that were lawful and job related in that the job applicants had failed to meet its experience requirements, which the Employer said were justified by business necessity. AF 250.

**Final Determination.** The CO's Final Determination denying certification was issued on July 25, 1996. AF 252-258. The CO found that the Employer failed to document its contention that the hiring criteria for this position are the minimum necessary for the performance of the job, and that it has not hired and cannot hire workers with less training

and/or experience. In addition, the CO found that the Employer's rebuttal had failed to establish that its job requirements arose from business necessity, or are normally required for the performance of this job in the United States. Finally, the Employer failed to demonstrate that the U. S. workers it rejected were not qualified by education, training, experience, or a combination of these factors to perform in the normally acceptable manner the duties of the occupation as it customarily is performed by other workers similarly employed. 20 CFR §§ 656.21(b)(5), 656.21(b)(2), 656.24(b)(2)(ii). AF 257.<sup>4</sup>

(1) The CO rejected the Employer's proof that the Alien was qualified by experience in both residential and commercial electricians' work and by experience working with the New York City ("NYC") electric codes.<sup>5</sup> The CO explained that while the evidence of record did show that the Alien has knowledge of the NYC codes, there was no evidence that he acquired the training before his employment with this Employer. *Id.* In addition, the CO rejected the Employer's proof of experience as an electrician in residential and commercial areas, explaining that the evidence that maintaining the residences of senior employees of the Guyana Sugar Corporation was "part of the Alien's responsibilities" did not show that he personally had performed work of this nature, which the Employer designated as a job requirement. AF 256.

(2) The CO then found that the Employer's job description combined the duties of an Electrician with the work of an Electronics Technician. The CO pointed to the NOF discussion of this issue and noted the instructions to submit rebuttal evidence that it was the industry custom for Electricians to repair or trouble shoot analog/digital electronic equipment, and that the Employer, itself, historically required its Electricians to trouble shoot such electronic equipment as part of the duties of employment in this occupation. While accepting the

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<sup>4</sup>The CO pointed out that in the implementation of the statutory provisions for alien labor certification, it is fundamental that the job offered must be clearly open to any qualified U. S. worker and that the U. S. workers applying for a job that an employer has offered to an alien may only be rejected for reasons that are lawful and job related. 20 CFR §§ 656.20(c)(8), 656.21.(b)(6).

<sup>5</sup>**DOT No. 828.261-022 ELECTRONICS MECHANIC** (any industry) alternate titles: communication technician; electronics-equipment mechanic; electronics specialist; electronics-system mechanic; electronics technician; maintenance engineer Repairs electronic equipment, such as computers, industrial controls, audio and video systems, radar systems, telemetering and missile control systems, transmitters, antennas, and servomechanisms, following blueprints and manufacturers' specifications, and using handtools and test instruments: Converses with equipment operators to ascertain problems with equipment before breakdown, and to determine if breakdown is due to human error or mechanical problems. Tests faulty equipment and applies knowledge of functional operation of electronic units and systems to diagnose cause of malfunction. Tests electronic components and circuits to locate defects, using oscilloscopes, signal generators, ammeters, and voltmeters. Replaces defective components and wiring and adjusts mechanical parts, using hand-tools and soldering iron. Aligns, adjusts, and calibrates equipment according to specifications. Calibrates testing instruments. Maintains records of repairs, calibrations, and tests. May enter information into computer to copy program from one electronic component to another, or to draw, modify or to store schematics, applying knowledge of software package used. May install equipment in industrial or military establishments and in aircraft and missiles. May operate equipment, such as communication equipment or missile control systems in ground and flight test, and be required to hold license from governmental agency. May be designated according to type of equipment repaired as Customer-Engineering Specialist (office machines); Electronics Mechanic, Computer (any industry); Radar Mechanic (any industry); Voting-Machine Repairer (government ser.). GOE: 05.05.10 STRENGTH: M GED: R4 M4 L4 SVP: 7 DLU: 89

Employer's proof of the need for the Electrician to trouble shoot electrical equipment, the CO rejected Employer's proof that it was an industry custom or a business necessity for it to include a job requirement that the Electrician be qualified to trouble shoot electronic analog/-digital equipment.

(3) Finally, the CO rejected Employer's rebuttal explanation for its rejection of thirty-six U. S. applicants on grounds that "they had no experience in troubleshooting analog and digital electrical equipment" concluding that the Employer's reasons were neither lawful nor job related. In addition, the CO concluded that seven of the workers Employer claimed to have interviewed either were not contacted at all or were contacted and questioned about a position entirely different from the job advertised. AF 251-254.

**Appeal.** On August 26, 1996, the Employer appealed to BALCA. The Employer's appeal included both a letter-brief responding to the findings of the CO in the Final Determination and copies of documents previously filed as part of the application and rebuttal. AF 259-299.

## Discussion

(1) Although the NOF noted that Employer the was required to prove the Alien's experience in residential and commercial electrical work that met New York City electrical code standards, the Employer's rebuttal and other evidence was limited to proof that the Alien's former employment in Guyana had included such duties among his other "responsibilities" on that job. As the CO noted in the Final Determination, such evidence was not sufficient to sustain Employer's burden of proof under 20 CFR § 656.21(b)(5). Consequently, without overlooking extensive proof that the Alien is well qualified in many aspects of the work of an Electrician, the Employer's job description is the criterion by which the Alien's experience must be judged in the context of this application. It required two years of experience in the Job Offered, which included:

To install light, heat and power in and on buildings in the City of New York according to the New York City electric codes. To trouble-shoot electrical problems in residential, commercial and industrial areas.

*Cf supra.* As there is sufficient evidence to support the CO's conclusion that the Employer failed to establish that the Alien has two years of experience in either the installation of light, heat and power in and on buildings in the City of New York according to the New York City electric codes, or trouble shooting residential and commercial electrical problems specified by the Employer's application, this finding of fact is affirmed.

20 CFR § 656.21(b)(5) requires the employer to prove that its hiring criteria represent the employer's actual minimum requirements for the position. The employer must also show that it has not hired workers with less training or experience for jobs similar to the job offered or that it is not feasible to hire workers with less training or experience than that required by the position

at issue. By preventing the employer from requiring greater qualifications of a U. S. worker than it demands of the alien the employer is prevented from treating the alien more favorably than it treats a similarly situated U. S. worker. **ERF Inc., d/b/a/ Bayside Motor Inn**, 89 INA 105 (Feb. 14, 1990). It is well established that, if an employer has hired or seeks to hire an alien whose qualifications are below criteria applied to the hiring of U. S. candidates for the same job, it has violated 20 CFR § 656.21(b)(5) unless it demonstrates that it is not feasible to hire a U. S. worker without the training or experience it now demands. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992). As the Employer did not sustain its burden of proof, the CO's denial of certification should be affirmed as to this issue.

Based on Employer's application, as offered the position was classified as "Electrician" under DOT Occupational Code No. 824.261-010.<sup>6</sup> The findings that the Employer combined the duties of an Electrician with the work of an Electronics Technician and the findings that the Employer rejected U. S. applicants for reasons were neither lawful nor job related are based on a common defect. While the DOT descriptions of the occupations of Electrician and Electronics Technician clearly are different, the Employer's job duties incorporated both occupations in its application, as noted above. When the NOF called the defect to the attention of the Employer for the purposes of its rebuttal and Employer offered evidence that it contended showed this to be a common practice in the area where it does business, the CO did not find its proof convincing. Reexamination of the exhibits that Employer filed confirms that the extracts from internet web sites do not state any facts that would lead to the inference Employer would draw. Moreover, the letter by a prospective bidder to the New York City Transit Authority did not contain enough information to establish that the Employer's combination of duties is common to the industry. AF 222. Finally, although this letter may support the Employer's declaration that the combination of duties is essential to its capacity to compete with other bidders, the evidence

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<sup>6</sup>**DOT No. 824.261-010 ELECTRICIAN** (construction) alternate titles: wirer Plans layout, installs, and repairs wiring, electrical fixtures, apparatus, and control equipment: Plans new or modified installations to minimize waste of materials, provide access for future maintenance, and avoid unsightly, hazardous, and unreliable wiring, consistent with specifications and local electrical codes. Prepares sketches showing location of wiring and equipment, or follows diagrams or blueprints, ensuring that concealed wiring is installed before completion of future walls, ceilings, and flooring. Measures, cuts, bends, threads, assembles, and installs electrical conduit, using tools, such as hacksaw, pipe threader, and conduit bender. Pulls wiring through conduit, assisted by ELECTRICIAN HELPER (any industry) 829.684-022. Splices wires by stripping insulation from terminal leads, using knife or pliers, twisting or soldering wires together, and applying tape or terminal caps. Connects wiring to lighting fixtures and power equipment, using handtools. Installs control and distribution apparatus, such as switches, relays, and circuit-breaker panels, fastening in place with screws or bolts, using handtools and power tools. Connects power cables to equipment, such as electric range or motor, and installs grounding leads. Tests continuity of circuit to ensure electrical compatibility and safety of components, using testing instruments, such as ohmmeter, battery and buzzer, and oscilloscope. Observes functioning of installed equipment or system to detect hazards and need for adjustments, relocation, or replacement. May repair faulty equipment or systems [ELECTRICIAN, MAINTENANCE (any industry) 829.261-018]. May be required to hold license. May cut and weld steel structural members, using flame-cutting and welding equipment. May be designated according to work location as Mine Electrician (mine & quarry). GOE: 05.05.05 STRENGTH: M GED: R4 M4 L3 SVP: 7 DLU:

that addresses Employer's business necessity is incomplete and does not go beyond this bald state-ment of its apprehension.

As Employer's questioning U. S. workers about experience in trouble shooting analog and digital electrical equipment was beyond the scope of the work of an Electrician, as described by the U. S. workers' answers to questionnaires, the CO correctly found that the Employer rejected them for reasons that were not shown to be lawful or job related.

Accordingly, we find the CO's denial of certification was based on sufficient evidence and should be affirmed and the following order will enter.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel.

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.